Tanavanus Sdn Bhd v Simon Jingking Pingguan

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K22-34 OF 1995
TEE AH SING JC
22 MARCH 1995

Civil Procedure *— Writ of summons — Striking out — Defendant adjudicated bankrupt before commencement of action — Claim for unliquidated damages and injunction — Whether a debt provable in bankruptcy — Whether leave of court needed before commencing action — Bankruptcy Act 1967 ss 8(1) & 40(1)*

Bankruptcy *— Practice and procedure — Writ against bankrupt — Whether leave of court necessary — Whether application for injunction and unliquidated damages was 'debt provable in bankruptcy' — Bankruptcy Act 1967 s 40(1)*

By an agreement made between the plaintiffs and the defendant ('the agreement'), the defendant agreed to grant the plaintiffs authority to remove stones from his land for quarrying purposes, in consideration for a sum of payment. However, the plaintiff alleged that the defendant later breached the agreement by fencing up the land which in effect stopped the plaintiffs' quarry operations. The plaintiffs filed a writ of summons against the defendant praying for, inter alia, an order to restrain the defendant from obstructing the plaintiffs from carrying out their quarry operations, and loss and damages to be assessed by the court. The defendant then filed a summons-in-chambers for an order to set aside the writ, on the ground that the plaintiffs' cause of action was irregular ab initio and premature in that: (i) the plaintiffs had failed to obtain leave from the High Court before commencing the action contrary to the requirement of s 8(1) of the Bankruptcy Act 1967 ('the Act'), as a receiving order had been made against the defendant; and (ii) the commencement of action without leave was an abuse of the court process. The plaintiffs, on the other hand, argued that their claim was not a debt provable in bankruptcy within the meaning of s 40(1) of the Act, and thus not caught by s 8.

Held, setting aside the plaintiffs' writ:

(1) By virtue of s 8 of the Act, after the making of a receiving order against the defendant, the creditor to whom the defendant was indebted in respect of any debt provable in bankruptcy could not commence any legal proceeding against the defendant in respect of such debt, unless leave of the court have been first obtained.

(2) The meaning of a 'debt provable in bankruptcy' could be found in s 40(1) of the Act, which, in effect provides, inter alia, that a demand in the nature of unliquidated damages arising by reason of a contract and not otherwise, would constitute a 'debt provable in bankruptcy'.

(3) In this case, the claim of the plaintiff for the restraining order arose out of the agreement and not otherwise. Also, the loss and damages claimed were within the meaning of 'unliquidated damages' under s 40(1). Hence, the present claim came within the ambit of s 40(1) as a debt provable in bankruptcy and leave of the court was required under s 8(1) before commencement of the action.

[Bahasa Malaysia summary

Melalui suatu perjanjian yang dibuat di antara plaintif dengan defendan, ('perjanjian tersebut'), defendan telah bersetuju untuk memberikan plaintif kuasa untuk mengalihkan batu-batan dari tanahnya untuk tujuan kuari, atas balasan sejumlah bayaran. Walau bagaimanapun, plaintif mengatakan bahawa defendan kemudiannya memungkiri perjanjian tersebut apabila beliau memagari tanahnya yang mengakibatkan penghentian kerja kuari plaintif. Plaintif telah memfailkan suatu writ saman terhadap defendan untuk memohon, antara lain, suatu perintah bagi menyekat defendan daripada menghalang plaintif daripada menjalankan kerja kuari, serta kerugian dan ganti rugi yang akan ditaksirkan oleh mahkamah. Defendan kemudiannya memfailkan suatu saman dalam kamar untuk memohon perintah untuk mengenepikan writ tersebut, atas alasan bahawa kausa tindakan plaintif adalah luar aturan ab initio dan pramasa kerana: (i) plaintif telah gagal mendapatkan kebenaran daripada Mahkamah Tinggi sebelum memulakan tindakan terhadap defendan, bertentangan dengan syarat s 8(1) Akta Kebankrapan 1967 ('Akta itu'), oleh kerana suatu perintah penerimaan telah dibuat terhadap defendan; dan (ii) memulakan tindakan tanpa kebenaran merupakan suatu penyalahgunaan proses mahkamah. Sebaliknya, plaintif mengatakan bahawa tuntutan plaintif bukan merupakan suatu hutang yang boleh dibuktikan dalam kebankrapan mengikut maksud s 40(1) Akta itu, dan dengan itu, tidak termasuk dalam lingkungan s 8.

Diputuskan, mengenepikan writ plaintif:

(1) Mengikut s 8 Akta itu, selepas perintah penerimaan dibuat terhadap defendan, seseorang pemiutang yang dihutang oleh defendan berkenaan dengan suatu hutang yang boleh dibuktikan dalam kebankrapan tidak boleh memulakan apa-apa prosiding undang-undang terhadap defendan berkenaan dengan hutang tersebut, melainkan jika kebenaran mahkamah telah diperolehi terlebih dahulu.

(2) Makna suatu 'hutang yang boleh dibuktikan dalam kebankrapan' boleh didapati dalam s 40(1) Akta itu, yang secara keseluruhannya, memperkatakan antara lain, bahawa sesuatu tuntutan yang merupakan ganti rugi jumlah tidak tertentu yang timbul daripada suatu kontrak, dan bukan sebaliknya, adalah suatu 'hutang yang boleh dibuktikan dalam kebankrapan'.

(3) Dalam kes ini, tuntutan plaintif untuk perintah penyekatan tersebut terbit daripada suatu perjanjian, dan bukan sebaliknya. Juga, kerugian dan ganti rugi yang dituntut adalah termasuk dalam maksud 'ganti rugi jumlah tidak tertentu' di bawah s 40(1). Lantaran itu, tuntutan ini termasuk dalam lingkungan s 40(1) sebagai suatu hutang yang boleh dibuktikan dalam kebankrapan dan kebenaran mahkamah adalah diperlukan di bawah s 8(1) sebelum tindakan ini dimulakan.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No S02–201 of 1995.]

Notes

For cases on striking out of writs of summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3712–3723.

For cases on practice and procedure in proceedings involving bankrupt, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1532–1564.

Legislation referred to

Bankruptcy Act ss 2, 8(1), 40

Lee Chuen Wan (*Shelley Yap Leong Tseu Chong Chia & Co*) for the plaintiffs.

Paul Chin (*Paul Chin & Co*) for the defendant.

Cur Adv Vult

Tee Ah Sing JC: This is a summons-in-chambers by the defendant for an order to set aside the writ on the ground that the plaintiffs' cause of action is irregular ab initio and premature in that:

(1) the plaintiffs have failed and/or neglected to obtain the leave of the High Court before commencement of the action against the defendant which leave is a prerequisite to its commencement by virtue of s 8(1) of the Bankruptcy Act 1967; and

(2) the commencement of the action without leave is an abuse of the court process.

The said summons-in-chambers is supported by the affidavit of Paul Chin Yin Khi affirmed on 6 March 1995.

In para 4 of the said affidavit, it is averred that on 1 March 1995, the defendant obtained the leave of the High Court at Kota Kinabalu to enter a conditional appearance to the action herein, and this application herein is made pursuant thereto to strike out the action on the following grounds:

(i) I am advised and verily believed that a receiving order was made against the defendant by the High Court at Kota Kinabalu dated 8 January 1993, and by s 8 of the Bankruptcy Act 1967, the Official

Assignee was thereby constituted as the official receiver of the property of the defendant.

(ii) By virtue of s 8 of the Bankruptcy Act 1967, I am advised and verily believe that no creditor to whom the defendant is indebted shall commence any actions or other legal proceedings against the defendant in respect of such debt thereafter unless leave of the court shall have first obtained.

(iii) I am advised and verily believe that the plaintiff has failed to apply and/or obtain leave of the court before commencement of the action herein against the defendant, contrary to the requirement of s 8 of the Bankruptcy Act 1967 and hence, the writ and/or the action herein is irregular ab initio and premature and ought to be struck out for the same reason.

(iv) The commencement of the action herein without leave is an abuse of the court process.

The plaintiffs have filed a summons-in-chambers and writ of summons against the defendant.

The relevant parts of the statement of claim are as follows:

(1) The plaintiffs are a company incorporated in Malaysia under the Companies Act 1965 and have an office at No 15 Taman Syn Fah, Batu 9 Jalan Tuaran, Menggatal, Sabah, Malaysia.

(2) The defendant is the registered owner of a parcel of land held under land title No FR1093 situated at Kg Malawa, Menggatal in the district of Kota Kinabalu (hereinafter referred to as 'the said land').

(3) By an agreement dated 3 September 1987 (hereinafter referred to as 'the said agreement'), made between the plaintiffs and the defendant, the defendant, inter alia, agreed:

(a) to grant the plaintiffs authority to remove stones from the said land for quarrying purposes; and

(b) to accept a royalty of RM2 (Ringgit Malaysia Two) per cubic yard of stones removed from the said land.

(4) The plaintiffs had also made an advance payment of RM60,000 to the defendant being royalty for the extraction of stones from the said land.

(5) Sometime in late 1994, the defendant, without the permission of the plaintiffs or its servants trespassed into the plaintiffs' quarry site.

(6) On 26 January 1996, the defendant without giving any notice to the plaintiffs, instructed his servants or agents to fence up the said land which put a stop to the plaintiffs' quarry operations on the said land, and thereby breached the said agreement.

(7) As a result of the defendant's unreasonable action and breach of the said agreement, the plaintiffs suffered irreparable loss and damage to its business and reputation as contracts and orders for stones could not be fulfilled by the plaintiffs on time. The plaintiffs also could not commit themselves to any new orders for stones.

(8) The plaintiffs through its solicitors, Messrs Shelley Yap Leong Tseu Chong Chia & Co, notified the defendant's solicitors, Messrs Paul Chin & Co on 26 January 1995, concerning the defendant's unreasonable

and drastic action and the consequences of such action on the plaintiffs' business.

(9) The plaintiffs had also lodged a police report against the defendant on 26 January 1995.

(10) Despite the said notice and the police report, the defendant continues to threaten the plaintiffs and its servants and failed, refused or ignored to remove the fence, thereby restraining the plaintiffs access to the said land to carry out its quarry operations.

And the plaintiffs claim from the defendant:

(a) an order from the honourable court to restrain the defendant whether by himself or his servants, agents or nominees from howsoever obstructing, whether by fencing the land or otherwise, the plaintiffs, their servants or agents from entering the land No FR1093 situated at Kg Malawa, Menggatal in the district of Kota Kinabalu, to carry out their quarry operations on the said land pursuant to the agreement dated 3 September 1987;

(b) loss and damages to be assessed;

(c) refund of the sum of RM60,000 being the royalty paid in advance to be assessed;

(d) costs; and

(e) any other relief or remedy as this honourable court may deem fit to grant.

The plaintiffs' summons-in-chambers is for an injunction restraining the defendant whether by himself or his servants, agents or nominees, howsoever obstructing, whether by fencing the land or otherwise, the plaintiffs, their servants or agents from entering the said land to carry out their quarry operations on the said land pursuant to the said agreement until the trial of this action.

Section 8(1) of the Bankruptcy Act 1967 ('the Act') reads as follows:

> On the making of a receiving order the Official Assignee shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

Section 40 of the Act provides the description of debts provable in bankruptcy as follows:

(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the receiving order for any debt or liability contracted by the debtor subsequent to the date of his so having notice.

A (3) Save as provided in sub-sections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

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(6) If in the opinion of the court the value of the debt or liability is incapable of being fairly estimated the court may make an order to that effect, and thereupon the debt or liability shall for the purposes of this Act be deemed to be a debt not provable in bankruptcy.

C The issue to be considered is whether the claim of the plaintiffs is a debt provable in bankruptcy or not.

The issue here is what is the meaning of the words 'any debt provable in bankruptcy'.

In s 2 of the Act 'debt provable in bankruptcy' or 'provable debt' includes any debt or liability by this Act made provable in bankruptcy.

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In this case, the rights of the plaintiffs to enter the said land to remove stones from the said land for quarrying purposes is by virtue of the said agreement.

According to para 6 of the statement of claim on 26 January 1995, the defendant without giving any notice to the plaintiffs instructed his servants or agents to fence up the said land, which put a stop to the plaintiffs' quarry operations on the said land and thereby breached the said agreement. And in para 7 of the statement of claim, it is averred that as a result of the defendant's unreasonable action and breach of the said agreement, the plaintiffs suffered irreparable loss and damage to its business and reputation as contracts and orders for stones could not be fulfilled by the plaintiffs on time. The plaintiffs also could not commit themselves to any new orders for stones.

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I am of the view that the rights of the plaintiffs to claim damages against the defendant arises out of the said agreement.

G I am also of the view that the acts complained of in paras 6 and 7 of the statement of claim constitute a breach of contract by the defendant.

Since there is a breach of contract, the plaintiffs can sue for unliquidated damages for any loss suffered.

I am of the view that by virtue of the words, 'Demands in the nature of unliquidated damages arising otherwise than by reason of a contract' in s 40(1) of the Act, the present claim of the plaintiffs in the nature of unliquidated damages is a debt provable in bankruptcy. The emphasis is on the word 'otherwise'. It would be otherwise if there is no contract between the plaintiffs and the defendant. In such a situation, I agree with the opinion of Catherine Tay Swee Kian in her book, *Bankruptcy, The Law and Practice* at p 72, where she has classified non-provable debts in bankruptcy as such demands which would arise out of some tortious act committed by the bankrupt and they cannot be proved, unless the damages

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had been liquidated by judgment or agreement before the date of the receiving order.

The learned counsel for the plaintiffs submitted that in the present case the claim of the plaintiffs in the first prayer is for a restraining order/ injunction against the defendant so that specific performance of the agreement can be carried out.

The learned counsel for the plaintiffs cited *Lewis Australian Bankruptcy Law* at p 97, where the learned author has opined that, 'cases in which an injunction or specific performance is the proper remedy may not give rise to provable claims'.

I am of the view that the claim of the plaintiffs for an injunction or specific performance arises out of the said agreement and not otherwise. As such, this comes within the ambit of s 40(1) of the Act, so I am of the view that it is a debt provable in bankruptcy.

In respect of the second prayer, it is a claim for loss and damages to be assessed. I am of the view that this loss and damages to be assessed comes within the meaning of the words 'unliquidated damages' in s 40(1) of the Act.

In conclusion, I am of the view that the claim of the plaintiffs in prayer one and two of the statement of claim comes within the ambit of s 40(1) of the Act, that is, it is a debt provable in bankruptcy. As such, leave of the court is required before the commencement of this action.

Since no leave under s 8(1) of the Act has been obtained, I set aside the writ in terms of the defendant's summons-in-chambers.

Order accordingly.

Reported by Isabel Liong